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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. 1061

WILLIAM GROSH and MARIO GARCIA KOHLY, *Petitioners*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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v.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioners William Grosh and Mario Garcia Kohly pray that a writ of certiorari issue to review the decision and judgment of the United States Court of Appeals for the Second Circuit entered in its Case No. 324, September 1964 Term (Docket No. 29342).

OPINION BELOW

The opinion of the Second Circuit Court of Appeals is not yet officially reported but is printed as Appendix B hereto. The District Court rendered no opinion.

JURISDICTION

The opinion of the Second Circuit Court of Appeals was rendered on February 26, 1965. On March 26, Mr. Justice Harlan granted an extension of time until April 12 in which to file this petition. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

This case involves the Due Process Clause of the Fifth Amendment to the United States Constitution; the Assistance-of-Counsel Provision of the Sixth Amendment to the Constitution; § 17b, 65 Stat. 717, 18 U.S.C.A. § 2 (1964 Cum. Supp.), and 18 U.S.C. §§ 11, 371, 478-481. All are set out in Appendix A hereto.

QUESTIONS PRESENTED

Petitioners were convicted of conspiracy and the possession, without "lawful authority," of plates from which the counterfeit notes of a "foreign government" could be printed. Petitioner Kohly, for whom petitioner Grosh worked, was the head of a Cuban de facto government-in-exile in this country and had arranged for the making of 50-peso plates with a view to undermining Castro's economy and purchasing arms for the anti-Castro underground. He had revealed his plan to United States Government officials and had proceeded with his plan on the assumption that he had lawful authority and that he was the head of a foreign government within the meaning of 18 U.S.C. § 11.

The questions presented are:

1. Whether the District Court erroneously charged the jury that "lawful authority" could come only from Castro, when (a) the statute does not define "lawful authority", and (b) the prosecution's own evidence showed that United States officials do in fact grant such authority.

2. Whether the District Court erroneously charged the jury that since the United States had recognized the Castro regime, "foreign government" meant only the Castro government, whereas 18 U.S.C. § 11 specifically defines "foreign government" to include a "body of insurgents * * *, irrespective of recognition by the United States."

3. Whether the relevant criminal sections are not unconstitutionally vague under the Fifth Amendment.

4. Whether evidence relating to the recognition of petitioner Kohly's government by this and other countries and to the approval of his plan by United States officials was not erroneously excluded, and the jury erroneously instructed, since this evidence would have vitiated any possibility of criminal intent.

5. Whether the trial court erroneously took the issue of entrapment from the jury.

6. Whether the District Court committed reversible error in allowing the admission into evidence against both petitioners of statements obtained from petitioner Kohly first by Secret Service agents and then by the United States Attorney's Office but before he was taken before a committing magistrate, in violation of Federal Rule of Criminal Procedure 5(a).

7. Whether petitioners were not denied the effective assistance of counsel, in violation of the Fifth and Sixth Amendments, both at their trial and on appeal.

STATEMENT

Petitioners were indicted on two counts: conspiracy (under 18 U.S.C. § 371) to violate 18 U.S.C. §§ 478-481, and unlawful possession (under 18 U.S.C. §§ 481 and 2) of plates from which the counterfeit notes of a foreign government could be printed. Petitioners were convicted and

sentenced to one year on each count, the terms to run concurrently (Tr. 887). The Second Circuit Court of Appeals affirmed on February 26, 1965 (Appendix B).

The genesis of this case goes back to 1959, just before Fidel Castro came to power in Cuba. Petitioner Kohly at that time was engaged in finance in Cuba. He came from a distinguished family, his father having served as Minister of Education in Cuba and later as Cuban Ambassador to Spain. Kohly himself had once run as a candidate for the Cuban Congress. In 1959 Kohly opposed Castro's rise to power and organized a body of rebels within Cuba to combat Castro's take-over (Tr. 314, 348, 392-393, 539-540, 542-543, 581-582). As a result of his activities, Kohly was arrested as a counter-revolutionary the same day Castro arrived in Havana, spent the night in jail, and fled the next day to the United States, where he has remained in political asylum ever since (Tr. 347, 398, 470, 540).

In this country, Kohly immediately set about organizing Cuban exiles and devising plans for the disruption of Castro's economy and the purchase of arms within Cuba to combat the Castro regime (Tr. 349-350, 542, 543-545). In June of 1960, for example, Kohly discussed his plans with a former Senator and a former Comptroller of the Treasury, and through them obtained an interview with then-Vice President Nixon (Tr. 353, 398-399). The Vice President in turn put Kohly in touch with an agent of the Central Intelligence Agency (CIA), who thereafter conferred with Kohly on numerous occasions over a three-month period (Tr. 354-355, 399-401).

Part of Kohly's plan at that time was to send 10-peso notes into Cuba for the purpose of purchasing arms for the Cuban underground (Tr. 169-173, 379). It was with this in mind that Kohly, in 1960 or 1961, met a man named Morrow, who described himself as an electrical engineer and who on occasion did secret work for both the CIA and the Navy Department (Tr. 134-135, 191-192, 195, 199-201,

212-214, 446, 459-460, 599). Morrow at first supplied Kohly with radio and telephone equipment for the Cuban underground and then agreed to make the plates for the 10-peso notes (Tr. 196-198, 395, 420).

Kohly fully revealed his plan to the Government—and evidence to this effect is not in any way rebutted in the record. He sent his plan, his budget and a sample 10-peso note to the Chairman of the Joint Chiefs of Staff by way of an Army colonel, and on August 16, 1961, was given a receipt in return (Tr. 361-365, 367-368, 382-385; see also Tr. 675-676). Kohly was prevented by the prosecution's objection from testifying whether the Government in any way objected to his plan (Tr. 386-387). However, Castro himself obviated the 10-peso venture by changing the Cuban currency (Tr. 32, 122, 173-176, 249-251, 379, 419).

In the meantime, Kohly was actively seeking and receiving support and recognition for his government-in-exile. His efforts culminated in June 1962, when the Cuban underground officially proclaimed him President of Manbises Libertadores, or, as it is known here, the United Organizations for the Liberation of Cuba (or simply as the Republic of Cuba-in-Arms) (Tr. 318-319, 350, 407-408a, 413-414, 471-473, 539-540, 573, 581-583).[1] This organization was made up of 96 of the 235 Cuban factions then active in the United States (Tr. 121, 350-353, 572, 579).

As President of the United Organizations, Kohly revised his 10-peso plan, as to which the United States Government had been fully informed, and now set out to have printed 50-peso notes which could be sent to Cuba for the purchase of arms, ships and other materials to be used against Castro (Tr. 378, 394-395, 462-467). These pesos were to be dis-

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[1] The proclamation appears in the Congressional Record for October 1, 1962 (87th Cong., 2d Sess. A7197-A7200) but was excluded from evidence by the District Court, along with all questions relating to it (Tr. 404-406; see n. 12, *infra*).

tributed in Cuba through the leaders of 10 of the 96 groups in the United Organizations (Tr. 421-422).

Kohly first consulted an attorney named Scholz, showed him one of the 10-peso notes, and asked if Scholz knew where Kohly could obtain a printer and funds for the venture (Tr. 93-94, 424-429). In addition, Kohly asked both Scholz and a Washington attorney for further assurance that the venture was legal (Tr. 396-397, 429, 484-485, 492). Kohly was advised that since he was the duly-constituted head of a "foreign government" as that term is defined in 18 U.S.C. § 11,[2] he was entitled to print the pesos (Tr. 377, 396-397, 414, 416, 429).

On July 24, 1963, in Arlington, Virginia, Kohly was introduced by the attorney, Scholz, to one Martin, who allegedly was a printer and who was represented as having done a great deal of work for the United States and for foreign governments (Tr. 24, 27, 434, 453). In point of fact, Martin was a Secret Service agent specially assigned to the Washington area from the New York Office of the Secret Service for the specific purpose of investigating this case (Tr. 23, 67-68, 437, 491, 516).

Kohly solicited Martin's help, explained that he was in the process of having 50-peso plates made, and showed Martin one of the 10-peso notes which had been printed earlier (Tr. 24-39). Kohly said he planned to use the 50-peso notes to purchase "boats and weapons and things of that nature to support the underground movement in Cuba" (Tr. 35; see also Tr. 95-96, 105, 445). Kohly also told Martin that he had discussed his plan with the CIA and the Federal Bureau of Investigation, that they "knew what he was doing," and that they were "more or less

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[2] Either Mr. Kohly or the reporter inadvertently cited § "18" at one point and § "19" at another, rather than § 11. These obviously were errors, since there are no such sections as 18 and 19 under Title 18. The defense attorney correctly cited § 11 (Tr. 782).

closing their eyes to it" (Tr. 30; see also Tr. 106). Martin agreed to help if he could talk to the plate-maker (Tr. 33-34). As a result, during July, August and September, 1963, a series of meetings took place in New York City, interspersed with telephone calls, in regard to the progress of the venture, the development of the new plates by Morrow, the paper to be used for printing (which was to be obtained through normal channels), the necessary financing, and other matters (Tr. 39-52, 144, 495-496, 502, 516).

In the meantime, according to Kohly, Morrow had said that his wife would not allow him to proceed with making the plates unless he first obtained Government clearance. Kohly urged him to comply. After a brief period, Morrow was able to assure Kohly that he had talked to a number of government officials, including CIA representatives, and that the plan had received everyone's sanction (Tr. 387-391, 435-437, 451-452, 553-557). Morrow completed the plates on September 26, 1963, and they were picked up the same night by Kohly's son and petitioner Grosh for delievery to Kohly. Grosh had met Kohly several years before, and Kohly paid him to act as chauffeur and handyman (Tr. 420-421, 434-435, 507-509, 524-531, 592-624). Even under the most liberal reading of the prosecution's evidence, Grosh played a negligible role in the entire proceedings (see, *e.g.*, the prosecution's summation at Tr. 795-801).

No 50-peso notes were ever printed. Instead, five days later, on October 1, Kohly took the plates to New York City and showed them to Martin in the lobby of the Waldorf Astoria Hotel, whereupon Secret Service agents working with Martin closed in and arrested Kohly (Tr. 52-56, 115-116, 450-451). When Grosh heard he was being sought, he turned himself in voluntarily to agents in Washington (Tr. 164, 630-633, 668-669).

Kohly testified before the Grand Jury at his own request and told his whole story (Tr. 369 *et seq.*). From then

until now he has insisted that he received legal advice to the effect that he was entitled to make the 50-peso notes as the head of a government-in-exile within the meaning of 18 U.S.C. § 11, and that he proceeded from the outset with the knowledge and implied assent, or *sub silentio* approval, of the United States Government (Tr. 377, 385-387, 396-397, 414-416, 454-455). Both he and Grosh have consistently maintained that they have never had any intent, specific or otherwise, to commit a crime.

The District Court, however, refused to allow petitioners to submit their theory of the case to the jury. Instead, the court took the position during the trial and instructed the jury, in substance, that (1) the recognition of a foreign government is an Executive act binding on the courts, and since the United States had never withdrawn formal recognition of Castro's government, that government is the only "foreign government" contemplated by the statute; and (2) the "lawful authority" referred to in the statute must come from the recognized foreign government—in this instance, the Castro government.[3]

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[3] The following exchanges occurred during the trial:

"MR. KAUFMAN [defense attorney]: I want to also show that my man is the head of government. My man is the head of the Cuban government here in the United States.

"THE COURT: How do you propose to do that?

"MR. KAUFMAN: Through him and through these people that I brought here.

"THE COURT: I would sustain the objection. Recognition of the government is an act of our government" (Tr. 359-360).

"MR. FANNING [Assistant United States Attorney]: * * * I do submit now that in any event the approval, the appropriate approval, if it is to be proven here, has to come from the proper authority; that would be either the Secretary of the Treasury or the Chief of the Secret Service, and in addition he would have to show that he had authorization from the present ruling government of Castro. So authorization from any other source would be completely irrelevant and immaterial.

"THE COURT: I don't happen to agree with you that approval must come from this government, but you injected it into the case.

Under these instructions, the jury had no choice but to find petitioners guilty, since Castro obviously had never given his assent to Kohly's plan. It is indicative of the attitude of the jury, however, that the foreman declined to read the verdict (Tr. 854), and the jury, though instructed that "The recommendation of leniency is not the function of the jury" (Tr. 853), nevertheless insisted on bringing in just such a recommendation (Tr. 854).

I think the only approval required under the statute is the approval of the government of the Republic of Cuba, but you are the one that has indicated that approval from our own government is required" (Tr. 366).

At the conclusion of the case, the court charged the jury that:

"Counterfeiting money means printing currency to imitate or to simulate that issued by a sovereign government without its authorized consent.

"The Republic of Cuba, headed by Fidel Castro, is a government recognized by our government. Recognition of a foreign government is a matter of political judgment determined by our Executive Department and is binding upon all citizens and non-citizens alike and, of course, courts and jurors as well.

"Recognition of the Castro government signifies our country's willingness to acknowledge that it speaks as the sovereign authority for the territory it purports to control. The fact that we do not maintain diplomatic relations with it does not diminish the duty of our government to protect the rights that are secured the government of the Republic of Cuba by the Law of Nations.

"The recognition by our government of the government of the Republic of Cuba, headed by Castro, which was in effect at all times charged in the indictment, precludes any finding by our courts, and that would include the jurors, that any individual, group or person claiming to represent the government of the people of Cuba was a foreign government which had the sovereign right to print and issue money on behalf of the Republic of Cuba, headed by Castro [Tr. 818-819]. • • •

"In broad outline the government contends that the defendants were embarked upon a program to violate our laws aimed at protecting the currency of a foreign government by preparing plates for eventual printing of 50 peso Cuban notes, which they intended to circulate and pass as genuine notes of the existing Castro Government, that they did this without lawful authority" (Tr. 836-837).

REASONS FOR GRANTING THE WRIT

1. Unconstitutional Vagueness, Statutory Construction and Lack of Criminal Intent.

The substantive section under which petitioners were convicted is 18 U.S.C. § 481.[4] This section, insofar as relevant to this case, makes it a crime to possess, "except by lawful authority," any plate from which may be printed any "counterfeit" note of "any foreign government." Thus, in order to have obtained a proper conviction, the prosecution should have proved that (1) petitioners possessed, or were principals to the possession of, one or more plates; (2) the note which could have been made from this plate would have been a counterfeit; (3) such counterfeit note would have been a note of a "foreign government," and (4) petitioners had possession of the plate without "lawful authority."

It was the theory of the defense at trial—and in fact the theory upon which Mr. Kohly proceeded from the time he first initiated his plan[5]—that petitioners had lawful authority to proceed as they did. This theory was based on two assumptions, *either* of which was sufficient to support their claim: first, petitioners had obtained from certain United States officials sufficient approval of their

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[4] The conspiracy count, 18 U.S.C. § 371, was based on an alleged conspiracy to violate 18 U.S.C. §§ 478 (forgery), 479 (uttering), 480 (possessing forged securities), and 481 (possessing plates). Each of these sections except § 480 includes the phrase, "any foreign government." Section 480 refers instead to "any foreign country." No effort was made at trial or in the charge to the jury to distinguish between "foreign government" and "foreign country," and in fact the court charged that "Sections 478 through 481 * * * deal with the currency and obligations of foreign governments" (Tr. 819). There was no proof that any forgery, uttering or possession of forged securities ever took place. The proof of a substantive offense was based solely on the possession of a plate, a violation only of § 481 (see the charge at Tr. 820-822).

[5] Tr. 377, 385-387, 396-397, 414-416, 454-455.

plan, and, secondly, Mr. Kohly himself was the head of an insurgent government-in-exile which qualified as a "foreign government" under 18 U.S.C. § 11.

(a) Lawful Authority.

"Lawful authority" is not defined anywhere in Title 18, and even the trial judge and the prosecution could not agree on a proper definition of the term.

The prosecution contended at first that authorization had to come from each of two sources—the Treasury Secretary (or the Secret Service Chief) of the United States *and* Castro (Tr. 366, quoted in n. 3, *supra*). The court disagreed. It thought approval need come only from Castro (*ibid.*). The prosecution thereupon adopted the court's position before the jury (Tr. 792, 801), and the court, without ever purporting to define "lawful authority" in specific terms, nevertheless effectively took the issue from the jury by instructing that only Castro could authorize the printing of the notes involved in this case (n. 3, *supra*).

The District Court's view that lawful authority can come only from Castro, however, was refuted by the prosecution's own witness, Mr. Charles Carnes, the Records Administration Officer of the Secret Service, Department of the Treasury (Tr. 288-289). He testified that certain parties in this country do in fact produce foreign currency, and that authorization for such production by the Chief of the Secret Service would appear in Mr. Carnes' files.[6] A search of his files had not revealed authorization granted

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[6] Mr. Carnes stated at the outset that "• • • the Chief of the Secret Service is authorized • • • [t]o authorize the reproduction of currency in certain instances," but this statement was stricken (Tr. 290). Mr. Carnes was then allowed to testify that "The authorization to use distinctive forms of paper, for example, is something that is regulated by the Chief of the Secret Service" (Tr. 291), that there are companies in this country that produce foreign currency (Tr. 292), that "The Secret Service has responsi-

to petitioners. Carnes conceded, however, that if the CIA or the Military Coordinator for the Vice President arranged for the printing of foreign currency, Carnes did not know whether his own records would reflect that fact (Tr. 299-300).

Carnes did not state upon what authority the Secret Service based its right to approve or disapprove the production of foreign currency, but research reveals that the alleged authority stems from Treasury Department Order No. 173 (Revision No. 1) (March 19, 1954), which is reproduced below.[7] *This Order has never been published in the Federal Register*[8] *and therefore was not binding on petitioners, who had no knowledge of it. Hotch* v. *United States,* 212 F.2d 280, 284 (9th Cir. 1954); *Graham* v. *Lawrimore,* 185 F. Supp. 761, 764 (E.D.S.C. 1960), *aff'd,*

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bility for enforcing statutes relating to the reproduction of foreign and American currency" (Tr. 293), that "The individuals or corporations, more commonly, who might desire to reproduce currency would be in contact with the headquarters of the Secret Service" (Tr. 294), that a search of his records relating to foreign currency showed no application "made for authorization on behalf of" petitioners (Tr. 298-299), and that if such authorization had been granted by the Chief of the Secret Service, there would be a record of it in Mr. Carnes' files (Tr. 299).

[7] "By virtue of the authority vested in me by Reorganization Plan No. 26 of 1950, there is hereby delegated to the Chief, United States Secret Service, authority to perform any function of the Secretary of the Treasury under title 18, U.S.C., sections 474, 476, 477, 481, 486, 487, 488, 489, 491(a), or 492 relating to offenses with respect to coins, obligations, and securities of the United States and foreign governments, and the remission or mitigation of forfeiture of counterfeiting paraphernalia. /s/ H. Chapman Rose, Acting Secretary of the Treasury." Reorganization Plan No. 26 simply transferred to the Secretary of the Treasury, with certain exceptions, "all functions of all other officers of the Department of the Treasury and all functions of all agencies and employees of such Department," and gave him the power to authorize other Treasury officials to perform his functions.

[8] An official of the Secret Service has informed counsel that the failure to publish this Order in the Federal Register was simply an oversight.

287 F.2d 207 (4th Cir. 1961); *United States* v. *Morelock*, 124 F. Supp. 932, 944 (D. Md. 1954).

But even if the Order were valid, the only functions it delegates to the Chief of the Secret Service are those which the Secretary of the Treasury has authority to perform under 18 U.S.C. §§ 474, 476, 477, 481, 486-489, 491(a) and 492. These sections reveal a bewildering array of terms used to describe the various parties who can grant authorization for the performance of particular acts. For example:

—"for the use of the United States by order of the proper officer thereof" (§ 474);

—"except under the direction of the Secretary of the Treasury or other proper officer" (§ 474); "except under authority from the Secretary of the Treasury or other proper officer" (§ 474), and "without authority from the Secretary of the Treasury or other proper officer" (§ 492);

—"except by direction of some proper officer of the United States" (§ 474);

—"except under the authority of the Secretary of the Treasury or some other proper officer of the United States" (§ 474), and "except under authority of the Secretary of the Treasury or other proper officer of the United States" (§ 489);

—"without authority from the United States" (§§ 476, 477);

—"upon request by any authorized agent of the Treasury Department, or other proper officer" (§ 492);

—"except by lawful authority" (§ 481) and "without lawful authority" (§§ 487, 488);

—"except as authorized by law" (§ 486);

—"not lawfully authorized" (§ 491); and

—"either under the authority of the United States or under the authority of any foreign government" (§ 489).

If nothing else, these various phrases show that (1) where Congress intends proper authority to be vested in an official *of the United States,* it spells this out in precise

terms, and (2) Congress contemplated in some of these sections that even where authorization must come from the United States, some official *other than* the Secretary of the Treasury can grant it. These conclusions become even more readily apparent in the light of the forfeiture section, § 492, which provides for the forfeiture to the United States of any apparatus intended to be used in the making of counterfeits of any foreign government and found in the possession of any person "without authority from the Secretary of the Treasury or other proper officer." This section does not use the phrase, "other proper officer *of the United States*" (emphasis added), such as is used in §§ 474 and 489, and yet the section clearly contemplates that *some* official other than the Secretary of the Treasury can give authorization.

Section 481, under which petitioners were convicted, is even more ambiguous. It provides that possession shall be illegal "except by lawful authority," without any reference whatever to the United States, the Secretary of the Treasury, an agent of the Treasury Department, some other officer of the United States, or a foreign government.

In the light of these various sections and the testimony of the prosecution's own witness, it clearly was error to charge the jury that "lawful authority" meant authorization from Castro. If this view of the statute were correct, the Treasury Secretary and the Secret Service Chief are presently operating outside the law. Nor can it be maintained, in the light of the language quoted above from these various sections, that *only* the Treasury Secretary or the Secret Service Chief can grant authorization on behalf of the United States, since § 481 is not one of the sections that spell out the authority of these officials; rather, it refers simply to "lawful authority." Petitioners were entitled to an instruction that would have allowed the jury to find that they had either direct or implied authority from officials of the United States, and that this authority was adequate under the statute.

The argument above, of course, is grounded on an attempt by petitioners to bring some semblance of order and sense to the statute. *Cf. United States* v. *Harriss*, 347 U.S. 612 (1954). If the Court for any reason disagrees with our construction, we submit that these various sections are unconstitutionally vague and ambiguous. This is, after all, a criminal statute, and petitioners were entitled, particularly under the facts of this case,[9] to "fair warning" of what was and was not prohibited conduct. The Due Process Clause of the Fifth Amendment to the Constitution requires no less. *Bouie* v. *City of Columbia*, 378 U.S. 347, 350-355 (1964); *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 89-92 (1921).

(b) Criminal Intent.

At the very least, petitioners were entitled to introduce evidence, and to have a proper instruction, that would have allowed the jury to find that they reasonably believed in—and had been led to believe in—their authority to print the pesos to such an extent that they could not and did not possess the requisite criminal intent.[10] This record, even as it stands, simply is not consistent with criminal

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[9] In *Lambert* v. *California*, 355 U.S. 255 (1957), this Court held unconstitutional a statute which provided criminal sanctions for failing to register under circumstances that would not alert the ordinary person to the necessity of registration. Surely, there is no difference in practical effect or in law between that type of situation and the one that confronted petitioners here, for while petitioners were alerted that their conduct would require "lawful authority," the evidence and the theory of the case they wanted to submit to the jury was that they were led to believe by responsible United States officials that they had such authority. In both cases, parties were effectively *misled* into committing criminal acts.

[10] The trial judge granted bail pending appeal because he considered the lack of criminal intent to be a sufficiently serious question on appeal (Tr. 889; see also Tr. 742).

intent.[11] But more importantly, while Mr. Kohly was allowed to state that he had formed a de facto government in Cuba and continued to carry it on in this country (Tr. 350-353, 413, 414, 572-573, 579-582), he was prohibited from introducing a vast amount of evidence not only that showed he was the legitimate head of a de facto government recognized in Cuba, in other countries, and by officials here as well (see argument below under "Foreign Government"), but also that bore directly on the issue of criminal intent.[12] Since the United States Government itself has

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[11] For example, petitioner Kohly sent his 10-peso plan (the forerunner of his 50-peso plan) to United States officials; he chose a photographer, Morrow, who had worked for both the CIA and the Navy; he chose a printer, Martin, who was represented to him as having worked for both the United States and foreign governments; he wanted Martin to obtain the paper for the pesos through normal channels; when Morrows said he would have to obtain Government clearance, Kohly urged him to do so; Kohly consulted two attorneys about the legality of his plan; he showed the plates to Martin not in some secluded byway but in the lobby of the Waldorf Astoria Hotel; and he insisted on telling his entire story to the Grand Jury. (See citations in the Statement, *supra*.) It is hard to imagine a plan more calculated to come to the attention of United States authorities.

[12] *E.g.*, Tr. 318-320, 323-325 (offer of proof at Tr. 328-329), 336-341, 345-346, 353-355 (offer at Tr. 355-361), 364, 386-387, 393-394, 395, 401, 404-407, 408-408a, 409-415, 418-419, 573-578, 588-589 (offer at Tr. 590), 675-677, 682). For example, Kohly was prevented by the court from showing whether, after he had informed the United States officials of his plan, he was then told not to proceed (Tr. 386-387); that he had been recognized by the Government of Guatemala as the head of the legitimate government-in-exile of Cuba (Tr. 410-411); whether he had applied for similar recognition from the Vatican and been asked to make a formal presentation (Tr. 409-410); whether, as head of the United Organizations, he had opened an office in Miami at the request of the United States Government (Tr. 576, 588-589); his reliance on, and the content of, a proclamation by the Cuban underground asking him to form a government-in-exile (Tr. 404-407; Defendants' Exhibits' Exhibit B for identification); what he had meant when he

taken numerous and extraordinary steps (short of formal withdrawal of recognition) to treat Castro's government, in effect, as illegal,[13] the jury may well have found—if allowed to do so—that the sum total of facts revolving about recognition, approval and authority vitiated the possibility of any criminal intent on the part of petitioners.

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told the Grand Jury he had information that there would be no air support for the Bay of Pigs invasion (Tr. 399-401); what he did with the radio and telephone equipment that Morrow gave him for the Cuban underground (Tr. 395); whether he told Morrow the first time he met him about the officers and composition of his United Organizations (Tr. 393-394); and whether a Cuban officer, the head of a Cuban organization, was also working with Mr. Kohly's group (Tr. 578).

[13] For example, the United States formally severed diplomatic relations with Cuba on January 4, 1961. The President, in Proclamation No. 3504, Oct. 24, 1962, 17 F.R. 10401, specifically designated the Castro government as "the Marxist-Leninist regime in Cuba." 50 App. U.S.C.A. prec. § 1 (1964 Cum. Supp.). The President declared Cuba to be a "foreign country within the Sino-Soviet bloc" in Executive Order No. 11071, § 2, December 28, 1962, 27 F.R. 12875, 26 U.S.C.A. following § 955 (1964 Cum. Supp.). And Cuba was designated a "Communist country" in 22 U.S.C. § 2370(f) (and in the subsequently enacted amendment, see 1964 Cum. Supp.). Acting pursuant to 22 U.S.C.A. § 2370(a)-(b), the President in Proclamation No. 3447, February 6, 1962, 27 F.R. 1085, declared in part that "the present Government of Cuba is incompatible with the principles and objectives of the Inter-American system • • • ." More recently, in 22 U.S.C.A. § 1643 (1964 Cum. Supp.), the Congress has referred to "violations of international law by the Government of Cuba," and in § 1643a(4) (1964 Cum. Supp.), the Congress has provided that "The term 'Government of Cuba' includes the government of any political subdivision, agency, or instrumentality thereof." In 1951 Congress passed 22 U.S.C.A. § 1611, which placed an embargo on the shipment of materials "to any nation or combination of nations threatening the security of the United States, including the Union of Soviet Socialist Republics and all countries under its domination • • • ." The Secretary of State designated Cuba in February and March, 1962, as a country under the domination of Russia within the meaning of this section.

(c) Foreign Government.

The District Court took the issue of what constitutes a "foreign government" away from the jury. It charged the jury that "The recognition by our government of the government of the Republic of Cuba, headed by Castro, which was in effect at all times charged in the indictment, *precludes* any finding by our courts, and that would include the jurors, *that any* individual, group or *person claiming to represent the government of the people of Cuba was a foreign government* which had the sovereign right to print and issue money on behalf of the Republic of Cuba, headed by Castro" (Tr. 819; emphasis added). Thus, the District Court precluded a finding that a de facto government of Cuba existed or that Mr. Kohly was the head of it. The Court undoubtedly based this charge on the well-established principle that "Political recognition is exclusively a function of the Executive." *Banco Nacional de Cuba* v. *Salebatino,* 376 U.S. 398, 410 (1964). In other words, since the United States had once recognized the Castro regime and had never formally withdrawn recognition, that act of Executive recognition precluded the courts from inquiring into what constituted a "foreign government" for the purpose of printing 50-peso notes.[14]

Petitioners concede that if § 481 stood alone, the District Court's charge might possibly have been a reasonable one.[15]

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[14] This was also the argument made to the Court of Appeals by the Government (Brief and Appendix for the United States of America, pp. 12-14). "The courts may not undertake an inquiry as to the status as a government of any group not so recognized by this country and must accept any government so recognized by this country (*id.* at 12).

[15] We note, however, that this Court has repeatedly recognized that a government need not be formally recognized and need not even assume a *de facto* status in order to enjoy prerogatives and incur responsibilities. A prime example was the Confederate government. "The government of the Confederate States, although in no sense a government *de jure,* and never recognized by the

But the District Court and the Court of Appeals have both failed to take note of 18 U.S.C. § 11, which *defines* the term "foreign government" for the purpose of § 481 and the other sections under Title 18. In § 11, Congress specifically has provided, insofar as relevant here, that "The term 'foreign government,' as used in this title, includes *any* government, faction, or *body of insurgents* within a country with which the United States is at peace, *irrespective of recognition by the United States*" (emphasis added).

Congress does not have the right, of course, to usurp the Executive function of recognizing foreign governments. But it does have the right to define terms in criminal statutes in any way it sees fit,[16] and it has chosen in § 11 to embrace within the term "foreign government" in § 481 a body of insurgents, whether formally recognized by this country or not.[17] Congress has thus chosen to allow the

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United States as in all respects a government *de facto*, yet was an organized and actual government * * *." *Oakes* v. *United States*, 174 U.S. 778, 794 (1899). And in *Underhill* v. *Hernandez*, 168 U.S. 250 (1897), this Court held that the acts of Hernandez were the acts of Venezuela even though at the time he committed them he was merely the commander of a revolutionary army attempting to take over the government. See also *MacLeod* v. *United States*, 229 U.S. 416 (1913); *Ford* v. *Surget*, 97 U.S. 1018 (1878); *Thorington* v. *Smith*, 75 U.S. 1 (1869). In *Banco Nacional de Cuba* v. *Salebatino*, *supra*, 376 U.S. at 423, 428, 430, the Court was careful to note several times that matters were not beyond judicial cognizance simply because they reached into the realm of foreign affairs.

[16] Even the definition of "the United States" can change from statute to statute. See *Worthy* v. *United States*, 328 F. 2d 386, 391 (5th Cir. 1964). See also the treatment of the term "foreign country" in *Cobb* v. *United States*, 191 F. 2d 604, 607-611 (9th Cir. 1951), *cert. denied*, 342 U.S. 913 (1952).

[17] Since § 11 allows the body of insurgents to be located in *any* country with which the United States is at peace, it is obvious that the insurgents can also be located in the United States. Otherwise, the section would be self-defeating. Moreover, in one of the few

jury to determine the factual issue of who constitutes a foreign government *for the purpose of this criminal statute.* Although § 11 was relied on by Mr. Kohly when he originally developed his plan (Tr. 396-397, 414-416[18]) and by defense counsel at trial (Tr. 782; see also Tr. 780), the District Court not only ignored § 11 but nullified the statutory phrases "body of insurgents" and "irrespective of recognition by the United States" by charging that United States recognition of the Castro regime *precluded* jury consideration of the subject (Tr. 819).

If Kohly and his group of insurgents constituted a "foreign government" within the meaning of §§ 11 and 481, the 50-peso notes could not have been "counterfeit"—an essential element of criminality—regardless of what the notes were intended to look like.[19] If, on the other hand, the District Court was correct in its interpretation of § 481, then petitioners have been denied due process of law under the Fifth Amendment because of the unconstitutionally vague and confusing interplay between §§ 11 and

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opinions that even mentions § 11, a Court of Appeals has held that the word "includes" is not used restrictively, and § 11 even applies to a country with which the United States is at war as well as one "with which the United States is at peace." *United States* v. *Gertz*, 249 F. 2d 662, 664-665 (9th Cir. 1957). If this is true, § 11 can also apply to a group of insurgents within the United States itself.

[18] See n. 2, *supra.*

[19] Moreover, even if the Court were to reject this argument, and the notes were deemed "counterfeit" in the sense that they looked like Castro's pesos, petitioners still prevail if they had—or were denied the right to prove that they had—"legal authority," since the testimony of the prosecution's witness, Carnes, shows that officials of the United States Government can and do sanction the printing even of counterfeit money (see pp. 11-14, *supra*).

481.[20] A statute written in such a way as to lead intelligent men into committing acts that are then deemed illegal offends due process.

This Court has never determined the meaning or applicability of § 11, which is based in large part on language in the Espionage Act of 1917, § 4 of Title VIII of the Act of June 15, 1917 (ch. 30, 40 Stat. 217, 226). This is, therefore, what the prosecution aptly described at the outset of the trial as a case of "first impression" (Tr. 10).

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[20] This is not the only way in which vagueness arises out of the interplay between these various sections. For example, 18 U.S.C.A. §§ 2 and 371 both apply only to offenses "against the United States." But §§ 478-481, upon which §§ 2 and 371 depend for specification of the substantive offenses, were not enacted under the general constitutional delegations of power relating to offenses against the United States. Rather, §§ 478-481 are supported by Article I, Section 8, Clause 10 of the Constitution, which gives Congress the power to punish offenses "against the Law of Nations." Sections 478-481 relate to crimes which, though punishable by the United States pursuant to the Law of Nations, are crimes not against the United States but against a foreign power. See *United States* v. *Arjona,* 120 U.S. 479 (1887); *United States* v. *White,* 27 Fed. 200 (E.D. Mo. 1886). *Cf. Tyson* v. *United States,* 285 F.2d 19, 21 (10th Cir. 1960). Therefore, §§ 2 and 371 either were not properly invoked in this case or give rise to unconstitutional vagueness because the ordinary person could well assume that the conspiracy and "principal" statutes are not applicable to the offenses prescribed in §§ 11 and 478-481.

The unusual and variable nature of §§ 11 and 481 themselves is illustrated by *United States* v. *Gertz,* 144 F. Supp. 740 (D. Hawaii 1956), *aff'd,* 249 F. 2d 662 (9th Cir. 1957), where a properly constituted and formally recognized government was nevertheless held not to come within the meaning of these sections simply because it was no longer in power.

2. The Entrapment Issue.

Petitioners requested the District Court to charge the jury on the issue of entrapment (Tr. 740-741, 847). The court, however, refused to allow this issue to go to the jury (Tr. 310-311, 743, 847).

Clearly, there was substantial evidence of entrapment. The overt acts under both the conspiracy count and the illegal possession count allegedly took place in New York, where the indictment was brought (Tr. 822-824, 833-834). Yet there was evidence that petitioners went to New York solely at the behest of Martin, a Government Secret Service agent (Tr. 431, 447, 449, 450, 451). Martin had been "specially" detailed from his office in New York to the vicinity of Washington, D. C., where petitioners lived (Tr. 609, 652, 891), for the purpose of posing as a man who could print the 50-peso notes (Tr. 27, 67, 102-103). As he himself put it about his frame of mind when he left for the assignment, "I knew what we wanted" (Tr. 68). If it had not been for him, *no alleged crime would have taken place in New York, and this indictment could not have been filed.*

Similarly, a vital contention in the prosecution's case was that petitioners were not simply attempting to buy arms and ruin Castro's economy but rather that they were interested in making a profit. See, *e.g.*, the prosecution's argument to the jury at Tr. 794. Yet Martin, the Government's agent, testified that it was not petitioners who suggested making a profit. This subject arose only *after* Martin, posing as a printer, told Kohly that he himself was not interested in patriotism or helping the Cuban underground; "my only interest in it would be to make money * * *" (Tr. 29). So far as Martin was concerned, "it was a profit-making scheme" (*ibid.*); "I was interested in making money" (Tr. 105). See also Tr. 372-373. This was, as Martin admitted, "a ruse" (Tr. 108), and it was

only in the face of this ruse that Kohly, if he spoke of the subject at all (see Tr. 375, 403), referred to potential profits in order to keep the "printer" in a venture that Kohly regarded as essential to the life of his country. The record is clear from Martin's own testimony that no suggestion of making a profit would ever have been made if Martin himself had not insisted that this was the only way he could be brought into the venture.

Martin was the same Secret Service agent who repeatedly telephoned Mr. Kohly (Tr. 39, 45, 52) and who came to his house (Tr. 372) before the commission of the alleged crime. He was the same agent who, in his own words, "ultimately * * * prevailed upon him [Kohly] to open the bag and let me see the plates" (Tr. 53) in New York at the time Kohly was arrested. He was the same agent who admitted that he "used a lot of ruses in this particular matter, in this case * * *" (Tr. 108). Yet Martin was not working alone. Another agent listened to Grosh's telephone conversation without his consent (Tr. 164-166, 177-181, 224, 231-242, 796), while a total of *six* agents became involved in the various activities leading up to the arrests (Tr. 90, 115-116). Even Morrow, the man who allegedly carried out the process of photographically developing the plates, had worked for both the CIA and the Navy (Tr. 199-201, 211-212, 453, 459-460, 599), so that the jury could have found that *every* necessary step in the alleged plan was participated in by a Government employee or agent, as well as the final inducement to bring the plates to New York City.

Clearly, there was "some showing of the kind of conduct by government agents which may well have induced the accused to commit the crime charged." *Lopez* v. *United States*, 373 U.S. 427, 434-435 (1963). The question is not whether entrapment was proved as a matter of law; the question is whether petitioners were "entitled to have the question submitted to the jury for its decision under an

appropriate instruction." *Johnson* v. *United States,* 115 U.S. App. D.C. 63, 64, 317 F.2d 127, 128 (1963).[21]

3. The Mallory Issue.

Petitioner Kohly, instead of being taken promptly before a committing magistrate upon his arrest, was taken instead to the Federal Building at 90 Church Street and questioned by several Secret Service agents (Tr. 118, 119). He was then transferred, again not to a committing magistrate, but to the office of an Assistant United States Attorney—the same one who eventually prosecuted petitioners at trial. Further questioning of Kohly ensued, and additional statements were obtained from him which were introduced in evidence against both petitioners at the trial (Tr. 119-125, 130).

This conduct constituted a clear violation of Federal Rule of Criminal Procedure 5(a), and the introduction of Kohly's statements was plain error affecting the substantial rights of both petitioners. *Mallory* v. *United States,* 354 U.S. 449 (1957); *Spriggs* v. *United States,* — U.S. App. D.C. —, 335 F.2d 283 (1964); *Naples* v. *United States,* 113 U.S. App. D.C. 281, 307 F.2d 618 (1962); Federal Rule of Criminal Procedure 52(b).[22]

4. Ineffective Assistance of Counsel.

Petitioners' trial was a mockery. From beginning to end, it was marked by outright hostility between counsel and the trial judge and "an intermittently continuous

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[21] In the *Johnson* case, even though the appellant purchased narcotics entirely on his own, the fact that a Government agent (1) gave money to a third party who presumably gave it to the appellant and (2) drove the car for appellant, was held sufficient to take the issue to the jury. In the instant case there was clearly far more active Government provocation, direction and control than in *Johnson.*

[22] The *Mallory* issue was not raised either at trial or on appeal. But see pp. 27-29, *infra.*

wrangle on an unedifying level." *Offutt* v. *United States,* 348 U.S. 11, 17 (1954). On the first morning of trial, the judge told the attorneys for both sides, "You are both very contentious and I want it stopped before we get started. * * * In preliminary matters I saw the same contentiousness and almost arbitrary attitude on the part of each. It is going to stop" (Tr. 20). But it did not stop. During the entire trial, the attorneys continued to snipe at each other and at the court, and at the conclusion the judge told petitioners' attorney: "This is an example again of something you have done through the trial. * * * It doesn't make sense and you know if I acted on this motion that was made by your own conduct, I would have no doubt as to what I would do" (Tr. 860-861).

Present counsel cannot distribute the blame. The trial judge may well have had cause for irritation by the conduct of counsel.[23] But the fact remains that petitioners were the innocent victims of the byplay. The court, no matter how vexed, had no right to forego its judicial impartiality to the detriment of the defendants. Yet the record shows that this is precisely what occurred. The judge accused defense counsel, for example, of elaborating too much (Tr. 61, 537, 548), wasting time (Tr. 72, 99-100), not listening to questions (Tr. 152), interrupting (Tr. 159, 289, 290, 510, 512, 537-538, 547, 555, 734, 795), making unnecessary statements (Tr. 196, 583, 596, 674), delaying matters or failing to move along (Tr. 207, 328, 331, 427), putting improper questions (Tr. 458-459, 597, 601, 638), conducting

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[23] Defense counsel requested that 148 witnesses—including President Johnson—be brought to the trial from all over the country at Government expense (Tr. 21, 873). He apparently was responsible for the loss of two very important defense witnesses (Tr. 681-682), and through a misreading of the complaint he was not even familiar with one of the sections under which petitioners were convicted (Tr. 307-308). Over 150 objections by the defense counsel were overruled, or his motions denied, during the four days of testimony.

improper redirect examination (Tr. 582), going far afield (Tr. 393-394, 395, 778), making speeches (Tr. 329), repeating matters as to which objections had been sustained (Tr. 329, 406), discussing improper matters in front of the jury (Tr. 342, 683-684), asking pointless questions (Tr. 352-353), talking too loudly or yelling (Tr. 358, 583, 663-664), leading witnesses (Tr. 36, 393, 428, 432, 597, 614, 627), asking questions that had nothing to do with the case (Tr. 409), making requests at the wrong time (Tr. 576), not letting a witness testify (Tr. 60), repeating himself (Tr. 687-688), unnecessarily reading material (Tr. 328), failing to put direct questions (Tr. 465), commenting on a witness's testimony (Tr. 127), not putting questions specifically (Tr. 241), trying indirectly to do what he could not do directly (Tr. 411), arguing too much (Tr. 71, 412, 568, 583), failing to go on to another subject (Tr. 103, 193), and going "all over the lot" (Tr. 327). Much of this occurred in the presence of the jury.

Typical of the court's comments to petitioners' attorney were the following:

> "Stop the bickering, will you please. Stop the histrionics and get down to the essentials and the case will move along" (Tr. 278).
>
> "You ask a question and then you don't give him a chance to answer and you pass a comment" (Tr. 191).
>
> "I must say for the record that this is somewhat of a misrepresentation as to the circumstances under which your motion was granted" (Tr. 343).
>
> "I don't agree with you one bit on that and I won't allow your characterizations to go on" (Tr. 444).
>
> "I must ask you to refrain from characterizing the manner in which the questions were put to the witness because I do not agree with you" (Tr. 463).
>
> "I am going to ask the jury to please disregard these statements by counsel" (Tr. 470).
>
> "I don't need any explanation from you as to what your point is" (Tr. 546).
>
> "You don't submit any such thing. * * * I am controlling this case" (Tr. 664).

"That is your statement. I show no annoyance, and let me say now that the record will indicate that your statement that you make your objections as a a lawyer will best be answered by this record" (Tr. 665-666).

"We are not playing games here * * *" (Tr. 284).

"This is typical of some of the other things that went on in this trial" (Tr. 862).[24]

Clashes between the court and counsel were frequent, often bitter, and sometimes sarcastic.[25] The court was even

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[24] The court's attitude toward defense counsel undoubtedly was magnified in the jury's eyes by the defense counsel's attitude toward his own clients. Twice in his summation and once to the court he referred to one or both of his clients as "shnooks" (Tr. 739-740, 751, 754; see also Tr. 875), and typical of his comments to Mr. Kohly during the trial were these: "Don't talk so much" (Tr. 497); "Please, Mr. Kohly, let the judge rule" (Tr. 352); "Don't tell me 'The same thing.' Tell us so that we know" (Tr. 386); "Please don't answer except what he asks you" (Tr. 477); "Could you wait until the Judge rules" (Tr. 479); "Answer my question" (Tr. 480); "May I respectfully ask your Honor to tell this witness that when I stand up not to answer the question * * *?" (Tr. 481); "Don't shake your head. If you have anything to say, say it for the record" (Tr. 586); "My question can take a yes-or-no answer" (Tr. 485); "Please. Would you please wait until the question is asked" (Tr. 485); "Can't you stop?" (Tr. 501); "Would your Honor ask the witness to please wait" (Tr. 566); "He is running this court and not you" (Tr. 567). The court occasionally joined in the criticism (*e.g.*, Tr. 383, 486).

[25] In one, when the court interrupted a defense objection, counsel said, "Thank you for permitting me to finish. I say that respectfully, sir," and the court replied, "I assume that you do" (Tr. 269). In another, when defense counsel asked if he had angered the court, the judge in reply accused him in the jury's presence of suggesting that "the Court of its own created that statement" (Tr. 568-569). In still another, the defense counsel commented that the prosecutor "should conduct himself as a lawyer," and the court replied, "I think you both should. * * * Sufficient has been indicated during the course of this trial for the court to state for the record that both of you have not conducted yourselves the way lawyers should in the conduct of this trial" (Tr. 286).

critical of the defense attorney out of his presence and in front of the jury because of a delay in the trial due to a traffic tie-up (Tr. 521-522). Defense counsel finally raised the issue of ineffective assistance of counsel.[26]

Other instances of improper conduct are reflected in the record. The court at one point mischaracterized—undoubtedly inadvertently—the statement of Mr. Kohly (Tr. 416), and at another would not allow the defense to object to a misstatement of fact by the prosecution during summation (Tr. 795). The prosecution relied on a report not in evidence (Tr. 796-797). Only once during the trial did the court instruct the jury when it left the box not to discuss the case, and at *no* time during the entire trial did the court instruct the jury not to read about the trial (Tr. 78, 182, 187, 257, 278, 285, 519-520, 602, 666, 738, 786). One prosecution witness, who had herself pleaded *nolo contendere* to a charge in this case, sat in the courtroom and listened to the very testimony she then took the stand to rebut, despite a rule by the court excluding witnesses (Tr. 668, 700-701, 708-719, 809-810).

Unfortunately, petitioners' lack of effective representation continued on appeal, although there was a change of counsel. Only a complete review of the appellate briefs can adequately demonstrate this point, but the sentence

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[26] "I respectfully submit that your Honor's indication of annoyance is very apparent and it is apparent to the jury, and in that way the rights of these defendants are being impaired to the point where they may very well not listen to counsel's summation, arguments in behalf of his clients and he therefore has been deprived of his constitutional rights of representation by counsel so that counsel can properly present the arguments of the defendants, and I must move for a mistrial at this point" (Tr. 666).

reproduced below from the main brief is typical.[27] Counsel completely failed to argue the entrapment and *Mallory* questions discussed above, although entrapment had been preserved at trial.[28]

Petitioners submit that through the actions of the court and their own attorneys, they lacked effective assistance of counsel throughout the proceedings below and therefore were denied due process of law in violation of the Fifth Amendment to the Constitution, and the assistance of counsel for their defense under the Sixth Amendment to the Constitution. *Cf. United States* v. *Garguilo,* 324 F.2d 795, 796 (2d Cir. 1963); *United States* v. *Wight,* 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied,* 338 U.S. 950 (1950).

CONCLUSION

This case presents important issues in the delicate area where criminal law and foreign policy overlap. Petitioners in no way seek to intrude in this country's foreign affairs, either directly or through the courts. But they are

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[27] "The case at bar raises a serious question as to whether a domestic court of the United States should attempt an importation into the law of the import of recognition of a government as per se being conclusive in construing the terms 'any government' in the pertinent criminal statutes, when the 'political' departments' policy and the legislative intent both are not expressed as to applicability of the statutes, and requires that the pertinent criminal statutes be interpreted that a recognized government, whose currency the statutes are intended to protect, cannot waive the protection of the statutes by its own actions less than by a declaration of war against the United States, particularly since withdrawal of diplomatic relations appeared to be meaningless to the Court below" (page 28).

[28] Petitioners contend that the violations were so blatant and so serious as to be cognizable under Federal Rule of Criminal Procedure 52(b).

entitled not to be prosecuted for acts which United States officials and the wording of our criminal statutes not only have failed to condemn in clear and unambiguous terms but have actually encouraged. We submit that under these circumstances certiorari is clearly appropriate.

Respectfully submitted,

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